United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2142

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

. x

[U.S. ex rel.] MARK FRASIER, :

Appellant, :

- against - : DOCKET NO. 75-2142

J. L. CASSELES, Superintendent of Great Meadow Correctional Facility, : IN FORMA PAUPERIS

Appellee. :

. x

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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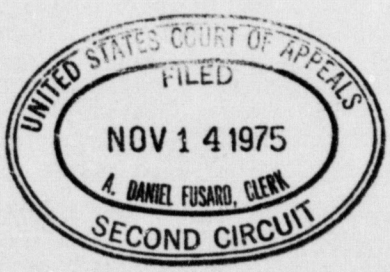
JOINT APPENDIX



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BRIEF FOR APPELLANT

OPINION BELOW

The Record contains the opinion of the United States District Court for the Southern District of New York. It has not been reported as yet. It is reproduced in the Appendix hereto.

QUESTIONS PRESENTED

1. May a denial of youthful offender treatment constitutionally be grounded solely upon the crime charged in an indictment?

2. May youthful offender treatment be constitutionally denied without judicial investigation, statement of reasons, or finding of fact?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "No State shall. . .deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

At the time of Appellant's conviction the New York Code of Criminal Procedure provided, in relevant part:

"§ 913-e Definitions

> For the purpose of this title, the term 'youth' shall mean a minor who has reached the age of sixteen years or over but has not reached the age of nineteen years; and the term 'youthful offender' shall mean a youth who has committed a crime not punishable by death or life imprisonment, who has not previously been convicted of a felony, and who is adjudged a youthful offender pursuant to the provisions of the following sections. The interstate compact on juveniles, [footnote omitted] except the provisions of article four thereof, shall apply to youthful offenders to the same extent as to minors below sixteen years of age.

* * * * *

§ 913-g Determination of eligibility

> 1. In any case where a grand jury has found an indictment and it shall appear that the defendant is a youth, the grand jury or the district attorney may recommend

to the court to which the indictment was returned, or to which the indictment was transferred for disposition, or, the court on its own motion may determine, that the defendant be investigated for the purpose of determining whether he is eligible to be adjudged a youthful offender.

* * *

4. Upon the termination of such examinations, investigation and questioning, the court shall determine whether such defendant is eligible to be adjudged a youthful offender. Should the court determine that the defendant is eligible to be so adjudged, no further action shall be taken on the indictment or information and the defendant shall be required to enter a plea of 'guilty' or 'not guilty' to the charge of being a youthful offender. Should the court determine the defendant ineligible to be so adjudged, it shall order the indictment or information to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had."

STATEMENT OF THE CASE

On August 19, 1961 appellant, Mark Frasier was charged with robbing $38 from a taxicab driver in the company of an adult co-defendant. No weapon was used, and the driver was not physically abused or injured. This was 18-year-old Mark Frasier's first "brush with the law".

Following indictment in the County Court, Bronx County, Frasier's attorney made a motion for Youthful Offender treatment under Title 7-B of the New York Code of Criminal Procedure. In support

of this motion, Frasier's attorney informed the court that Frasier was eighteen years old, that he had no prior criminal convictions, and that this was "the first time that [the defendant had] ever been in any trouble whatsoever". The court was also informed that Frasier had been raised by his grandmother in South Carolina from age 3 to age 13, and afterwards by his mother in New York; that he had completed the eleventh grade before leaving high school to find full-time employment; and that the defendant was laid off at the time of his arrest. (Exhibit D, Petition for Writ of Habeas Corpus).

The prosecutor filed an opposing affidavit urging the denial of Youthful Offender treatment solely on the ground that the charge was first degree robbery. The application was summarily denied, without any investigation being ordered or made and without any reason being given by the Court. Three weeks later Frasier pleaded guilty to felony of grand larceny, second degree.

Appellant has previously sought a Writ of Habeas Corpus from the United States District Court, Southern District of New York, denied by Memorandum and Order dated December 14, 1971. On appeal, this

Court affirmed in part and remanded the petition to the District Court to determine if appellant had exhausted his state remedies in challenging the conviction, United States ex rel. Frasier v. Henderson, 464 F. 2d 260 (2d Cir., 1972). On remand, by Memorandum Decision and Order dated November 6, 1972 in Docket 71 Civ. 4071, the District Court dismissed Frasier's petition without prejudice to his seeking the relief available to him in the state courts, on the ground that he had not exhausted his state remedies.

Thereafter, on February 6, 1973, appellant moved in Supreme Court, Bronx County to be resentenced nunc pro tunc, pursuant to People v. Montgomery, 24 N.Y. 2d 130, 299 N.Y.S. 2d 156 (1969), thereby reinstating his time for appeal. On April 25, 1973, appellant's 1961 sentence was vacated and he was resentenced nunc pro tunc to the same term, as a procedural technic to grant him access to the state appellate process. On January 31, 1974, the Appellate Division, First Department affirmed the 1961 conviction without opinion, as did the New York Court of Appeals on February 12, 1975.

Appellant, having thus exhausted his state remedies, thereafter again petitioned the United

States District Court, Southern District of New York, for Writ of Habeas Corpus on March 28, 1975, challenging the 1961 conviction which served as the predicate felony offense for the sentence which he is currently serving. Appellant's petition was denied by Memorandum and Order dated September 29, 1975 of United States District Court Judge Brieant. Appellant has appealed to this Court for review of that decision. Certificate of probable cause was entered by Judge Brieant on October 28, 1975:

> "In the interest of justice Petitioner's contention should be subject to appellate review. Pursuant to 28 U.S.C. §2253 and Rule 22 Federal Rules of Appellate Procedure I certify that probable cause exists to maintain the appeal, and in forma pauperis."

Appellant Frasier is now confined in the Great Meadows Facility at Comstock, New York, serving a sentence imposed upon him in 1968 as a second felony offender, predicated upon the Bronx County felony conviction in 1961.

ARGUMENT

POINT I

THE COURT BELOW ERRED AS A MATTER OF LAW IN FAILING TO DISTINGUISH BETWEEN DENIAL OF YOUTHFUL OFFENDER TREATMENT BASED SOLELY UPON THE CRIME ALLEGED IN THE INDICTMENT, AN UNTESTED EX PARTE ACCUSATORY INSTRUMENT, AND DENIAL BASED UPON A CONVICTION.

Under the provisions of the New York Youthful Offender Statute in effect at the time of appellant's 1961 conviction, an accused youth sought youthful offender treatment, and the trial court made its determination of such treatment, prior to trial. This is in contrast to the youthful offender statute which is currently in effect, under which the accused moves for youthful offender treatment after conviction as part of the sentencing procedure (Article 720, New York Criminal Procedure Law).

It is apparent that the Court below failed to perceive the critical result of the procedural difference -- appellant was denied youthful offender treatment before trial solely upon the basis of the crime alleged in the untested ex parte indictment, not after conviction by a constitutionally valid trial on the merits.

The Court below concluded that Judge Korn, the Bronx County Court Judge, did not abridge appellant's due process rights by failing to exercise its discretion, solely upon the following reasoning. (opinion, p. 7):

> "In denying petitioner's motion for youthful offender treatment, Judge Korn had before him the affidavits of the prosecutor and defensel counsel. At the time of sentence, Judge Korn considered a probation report and defense counsel's plea for leniency. In imposing a reformatory sentence as to Frasier and a prison sentence for his co-defendant Cobb, Judge Korn clearly considered Frasier's age and individual life circumstances." (emphasis added).

Appellant has not disputed in his petition the constitutionality of his sentence, but rather sought review of the constitutionality of the pretrial denial of youthful offender treatment. At the time he denied youthful offender treatment, Judge Korn did not have a probation report before him. The denial was based solely upon the affidavit of the prosecution, which opposed youthful offender treatment solely upon the ground of the crime charged in the indictment.

In concluding that a trial court could constitutionally consider the offense charged in the indictment, the court below stated its reasoning as follows (opinion, p. 9):

> "This may have been the sole argument raised by the District Attorney in opposing petitioner's application, nevertheless, the Court had additional materials

> before it for consideration. The Court's reference to the seriousness of the offense at the time of sentencing does not indicate a fixed sentencing policy for robbers, or a predisposition against all youthfull offender applications by defendants initially indicted for robbery-first degree." [Emphasis added].

The court thus overlooks the fact that the issue here is the constitutionality of the pre-trial denial of youthful offender treatment. The State Court Judge Korn may have had "additional materials before it for consideration" at the time of sentencing, but at the time it denied youthful offender treatment, the defendant was still presumed to be innocent, and the only reason urged by the prosecutor for denial of youthful offender treatment was the nature of the crime charged in the indictment.

As authority for its conclusion, the Court below cited United States v. Baker, 487 F. 2d 630 (2d Cir., 1973); United States v. Foss, 501 F. 2d 522 (1st Civ., 1974); and United States v. Schwarz, 500 F. 2d 1350 (2d Cir., 1974). All three cases concerned alleged abuses in post-conviction sentencing procedures, as a matter of fact no Federal case cited

by the court below dealt with pre-trial determinations, and as a consequence are inapposite to a judicial determination conclusively based merely upon the crime charged. The Court below also relied upon Dorszynski v. United States, 418 U.S. 424 (1974), in which the petitioner sought review of the trial court's failure to make a finding that the petitioner would not derive benefit from treatment under the Federal Youth Corrections Act of 1950 (18 USCS §§5005 et seq.) The Supreme Court remanded, holding that an express finding on the record was a statutory requirement. Dorszynski is inapposite to the case at hand, in that the Youth Corrections Act, in procedures similar to the current New York Youthful Offender Statute, mandates that the judicial determination be made after conviction as part of the sentencing procedure. As a consequence, it does not bear on the issue of a pre-trial determination at arraignment, the procedure adopted by the youthful offender statute in effect at the time of appellant's 1961 conviction.

POINT II

DENIAL OF YOUTHFUL OFFENDER TREATMENT SOLELY UPON THE BASIS OF THE CRIME CHARGED WAS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

The Youthful Offender statute in effect in 1961 defined a person eligible to be adjudged a "youthful offender" as a minor less than 19 years old who has not previously been convicted of a felony and who has committed a crime not punishable by death or life imprisonment (Code of Criminal Procedure, §913-e). The Legislature thus declared that the commission of a non-capital crime (here, robbery) is not ground for denial of Youthful Offender treatment. Putting the proposition another way: an 18-year-old charged with a non-capital crime is eligible to be considered, at the very least, for Youthful Offender treatment.

Yet in petitioner's case the affidavit in opposition to the application for Youthful Offender treatment urged denial solely on the ground "of the nature of these charges, and the

circumstances surrounding them." There was no suggestion of <u>any</u> other reason than the crime charged for refusing to give the defendant consideration for Youthful Offender treatment. And that crime was not one of those specifically enumerated by the legislature as ground for automatic, summary denial of Youthful Offender treatment. Yet upon submission of the application, "the Judge denied it at the same moment it was presented, without any hearing, deliberation, or giving any reason."

The Court below found no constitutional impropriety in the trial Court's conclusive reliance upon the crime charged in the indictment (opinion, pp.8-9):

> "there was nothing improper in the Court's consideration of the underlying charge in its determination of a defendant's application for youthful offender treatment. While the statute then in effect categorically excluded only those youthful defendants accused of capital offenses or crimes which carried the punishment of life imprisonment, a judge could properly consider the offense charged and the alleged circumstances of its commission in exercising his discretion."

It is submitted that the discretionary power granted to the court by the Legislature in the Youthful Offender statute cannot constitution-

ally be construed to include the power to deny Youthful Offender treatment solely because of the nature of the crime charged. That question the Legislature reserved to its own decision: if a capital crime is charged, the defendant does not qualify for Youthful Offender treatment; if not, he does. To deny petitioner consideration for Youthful Offender treatment solely on the ground of the type of crime was an unconstitutional misinterpretation of the statutory grant of power. Recent New York decisions have squarely held that a denial of Youthful Offender treatment solely on the basis of indictment is a denial of due process and equal protection.

In People v. Brian R., 356 N.Y.S. 2d. 1006 (Sup. Ct. 1974), aff'd 365 N.Y.S. 2d 998 (App. Div. 1975), the defendant challenged the constitutional validity of the current New York Youthful Offender Statute, which precludes Youthful Offender treatment to youths who have been indicted for class A felonies. The New York Supreme Court held that the restriction, which gives conclusive weight to the untested allegations of an indictment, is violative of the

due process clause, in that it gives constitutionally impermissible significance to the ex parte grand jury accusation.

The Court also held the restriction to be violative of the equal protection clause, in that it irrationally discriminates against youths who were charged with Class A felonies, but ultimately convicted of lesser felonies:

> "There is, and can be no rational basis for treating differently youths who have been convicted of the same offense merely because one of them had originally been charged with a higher grade of offense. The restriction or classification based upon the charge made in the indictment rather than the charge proven in court is utterly capricious and irrational. It is therefore invalid under the equal protection clauses of both the state and federal constitutions. (Amendment XIV, United States Constitution; Article I, §11 New York Constitution). See, Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)." 356 N.Y.S. 2d. at 1010.

In accord are People v. Ruben S., 365 N.Y.S. 2d. 426 (Sup.Ct. Queens 1975), and People v. Charles S., 361 N.Y.S. 2d. 848 (Sup.Ct. N.Y., 1974). Contrary results have been reached in People v. Estrada, 364 N.Y.S. 2d. 332 (Sup. Ct. Kings, 1975) and People v.

Drayton, 367 N.Y.S. 2d. 506 (App. Div. 2nd Dept., 1975, in which the defendant's past, as reflected in a probation report before the Court, was unsavory). In Ruben, a youth charged with selling cocaine to an undercover agent pleaded guilty to a Class A Felony, and moved for youthful offender treatment. The defendant argued that the present New York Youthful Offender statute [CPL §§720.10 et. seq.], by denying youthful offender treatment to a youth on the basis of indictment, denies due process and equal protection. The Court agreed:

> "Buttressed by logic, motivated by justice and persuaded by appellate authority, this court can reach but one conclusion - that is, to remove the constitutional infirmity of section 720.10 of the Criminal Procedure Law that would deny to this defendant the opportunity to have him considered a youthful offender." 365 N.Y.S. 2d at 433.

Appellant submits that the denial of youthful offender treatment in the present case, on the basis of an indictment charging a crime not within the restriction of the statute, is a fortiori a denial of due process and equal protection. If the legislative act is un-

constitutional on the basis of its conclusive reliance upon an accusatory instrument, the arbitrary and capricious reliance of a Court upon an indictment charging a crime, as to which the statute was silent, is on its face a denial of due process and equal protection.

The statutory scheme contemplated a determination of whether to grant Youthful Offender treatment based on an investigation made on the recommendation of the Grand Jury, the District Attorney, or on the court's own motion (§913-g). The State recognizes that defendant has the right to apply for such determination, People v. Johnson, 32 A.D. 2d 968, 303 N.Y.S. 2d 210 (1969); People v. Bond, 36 Misc. 2d 557, 232 N.Y.S. 2d 875 (1962). The court, therefore, must be held obliged to exercise reasonable discretion in considering whether to order an investigation for the purpose of determining eligibility for Youthful Offender treatment.

It is submitted that as a matter of law to deny Youthful Offender treatment without in-

vestigation was an unconstitutional abuse of discretion where the only "adverse" information before the Court was the District Attorney's opposition, stated to be on the ground of the nature of the charges. The refusal of the Court even to order an investigation, in the face of the uncontroverted assertions of good reputation, background, record, and character in the affidavit in support of the application, can only be deemed arbitrary in that either there was no reason for the denial or the reason was the statutorily and constitutionally unacceptable reason of the nature of the charge against the defendant.

In holding that favorable determination of an application for Youthful Offender treatment could not be conditioned on a guilty plea, the Court in People v. Johnson, 32 A.D. 2d 968, 303 N.Y.S. 2d 210, 212 (1969), added the following pertinent observation:

> "The prejudice to defendant was heightened when the denial of his application was based solely on his participation in an armed robbery."

So, too, the well-reasoned dissent in People v. Fenner, 36 A.D. 2d 825, 321 N.Y.S. 2d 457 (1971), affirmed, 30 N.Y. 2d 509, 510 (1972), but on the authority of People v. Basey, 28 N.Y. 2d 627 (1971), which held the issue had not been properly preserved for appellate review. Justice Shapiro's dissent in Fenner pointed out:

> ". . . it would seem that the sole reason for denial by the Criminal Term of youthful offender treatment was based on the Assistant District Attorney's recommendation, which he made because 'this is a robbery in the 1st degree.' Defendant, by reason of his age, was eligible for youthful offender consideration (Code Crim. Pro., §§913-e, 913-g) and the mere fact that the basic crime charged was a robbery did not preclude such consideration. Being eligible for youthful offender treatment, defendant was entitled to an exercise of the court's--not the Assistant District Attorney's--discretion to grant or deny such treatment after 'investigation and questioning' (Code Crim. Pro. §913-g, subd. 3.)." (321 N.Y.S. 2d at p. 458).

Denying Youthful Offender treatment because, and solely because, the Court assumes the defendant committed the crime charged, is a denial of liberty without due process of

law. Suppose a defendant is ultimately found guilty of a lesser crime included in that with which he was charged: the denial of Youthful Offender treatment in such situation would patently have been wrong. Thus, this is not a question of discretion, but of presumption of innocence. It is the individual juvenile who is to be considered for Youthful Offender treatment, not what he is alleged to have done.

POINT III

DENIAL OF CONSIDERATION FOR YOUTHFUL OFFENDER TREATMENT WITHOUT INVESTIGATION, STATEMENT OF REASONS, OR FINDING OF FACT WAS UNCONSTITUTIONAL.

The Court below concluded that investigation, hearing, or explict findings are not constitutional requirements of a pretrial denial of youthful offender treatment, and that the absence of legislative guidelines is not offensive to the due process clause (Opinion, p.8):

> "Although it might be commendable in some cases for a sentencing judge to articulate his reasons for the sentence imposed, the Due Process clause does not require this procedure. United States v. Velazquez, 482 F. 2d 139 (2d Cir. 1973); United States v. Brown, 479 F. 2d 1170 (2d Cir. 1973). Nor does the fact that the sentencing statute permit the exercise of judicial discretion without legislative guidelines offend the Due Process clause. Smith v. Follette, supra; Sero v. Oswald, 351 F. Supp. 522 (S.D.N.Y. 1972). " (Emphasis added).

Again, the Court below has erroneously drawn an analogy between post-conviction sentencing procedure, where a trial record

has been created for appellate review, and the present case of a pre-trial determination at arraignment.

It is acknowledged, indeed, "clear beyond dispute" to the United States Supreme Court, that the question of Youthful Offender treatment is "critically important" to a juvenile, Kent v. United States, 383 U.S. 541, 556 (1966). The importance of this stage of criminal proceedings was stressed in People v. Towler, 30 A.D. 2d 876, 293 N.Y.S. 2d 7 (1968), and in People v. Johnson, supra, 32 A.D. 2d 968, 303 N.Y.S. 2d 210 (1969), which adverted to the "benign purposes" of the statute, which intended Youthful Offender treatment "as a protection to a defendant".

The vital importance of this protection being thus recognized, Youthful Offender treatment cannot be considered a privilege, rather than a right. Due process must be followed even though a juvenile has no right to Youthful Offender treatment. As the United States Supreme Court stated in

Goldberg v. Kelley, 397 U.S. 254, 262-3 (1970):

> "The constitutional challenge cannot be answered by an argument that public assistance benefits are ' a "privilege" and not a "right", Shapiro v. Thompson, 394 U.S. 618, 627, n.6 (1960). ***The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 169 (1951) (Frankfurter J. concurring), and depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

Kent, supra, turned in part upon interpretation of a Youthful Offender statute different from the one concerned here. But the Court also held that the "latitude" of a trial court under the statute

> ". . . is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" (383 U.S. at p. 553)

In an analogous situation, whether a charge is to be dealt with in Family Court, a similar obligation under the principles of Kent was recognized in Mtr. of

Montalvo v. Montalvo, 705 286 N.Y.S. 2d 605 (1968):

> "The Family Court Act makes no provision as to the procedure for determining whether retention of jurisdiction is "inappropriate". In Kent v. United States (383 U.S. 541, 554, 562), which involved a juvenile court's waiver of jurisdiction to a criminal court, the Supreme Court, interpreting the transfer provision in conformity with the Constitutional guarantee of due process, stated: "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice, dealing with adults, with respect to a similar issue, would proceed in this manner. * * * The hearing must measure up to the essentials of due process and fair treatment. Certainly the question of transfer here, from the Family to a criminal court, has as "tremendous" consequences" and is as "critically important" for the respondent (383 U.S. at p. 553), as the waiver question in Kent. The constitutional guarantees of due process require procedural protection for the respondent in the instant transfer determination."

This decision is cited favorably in Mtr. of Appell v. Appell, 327 N.Y.S. 2d 190, (1971), affirmed 30 N.Y. 2d 800 (1972), holding that "procedural due process is satisfied where the Family Court states reasons for its waiver of jurisdiction based upon the record before it."

In the present case there was a formal motion by the defendant to be accorded Youthful Offender treatment, supported by an affidavit setting forth facts as to background, reputation, and character which for the purposes of the motion are to be taken as true, People v. Judd, supra, 305 N.Y.S. 2d 316, 321. The prosecution opposed simply because of "the nature of these charges, and the circumstances surrounding them", and the Court summarily denied the motion, "at the same moment it was presented, without any hearing, deliberation, or giving any reason."

It is submitted that this was an unconstitutional denial of due process and equal protection of the laws, whether by the legislature in failing to set a proper standard or by the Court in arbitarily denying Youthful Offender treatment for no proper reason. The New York Court of Appeals has held that in connection with review of the determinations of a trial court, "the lack of specific findings unfairly infringes upon defendant's right to appeal", People, v.

Sykes, 22 N.Y. 2d 159, 164 (1968), citing Kent and Matter of Gault, 387 U.S. 1, 58. It is submitted that unless a standard of fairness is read into the Youthful Offender statute, it is unconstitutional, as Michigan's law providing for waiver of juvenile jurisdiction was held to be, People v. Fields, 388 Mich. 66 (1972). Indeed, the arbitrariness resulting from the lack of standards in our former Youthful Offender law was criticized by the Temporary Commission on Revision of the Penal Law and Criminal Code, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW, 445:

> "Secondly, the whole scheme, making no distinctions between eligible youth defendants with respect to the kinds of seriousness of the crimes charged or with respect to varying background factors, leaves everything--including the determination of whether youthful offender treatment will even be considered--to the discretion of the courts (People v. Bond, 1962, 36 Misc. 2d 557, 558, 232 N.Y.S. 2d 875; People v. Hines, 1960, 24 Misc. 2d 484, 485, 202 N.Y.S. 2d 875). Owing to widely differing practical considerations in different locations, to widely differing attitudes of individual judges toward youthful offender treatment, and to other factors, this results in flagrant disparities in the administration of the law."

It is submitted that the constitutional requirement of due process and

equal protection of the laws contemplates the existence of (1) a standard upon which the denial of a critical benefit generally afforded to youths under 19 not charged with a capital crime, Youthful Offender treatment, is to be based, (2) a form of hearing at which the asserted grounds for denial of the benefit may be answered by the defendant and (3) a statement of the Court's reasons for denial of Youthful Offender treatment, so that if appropriate the determination may be challenged on appeal. In the absence of such standard, hearing, and statement it was an unconstitutional denial of due process and equal protection of the laws to deprive appellant Frasier of the opportunity for investigation to determine Youthful Offender eligibility.

CONCLUSION

For the reasons stated above, Appellant respectfully urges that the decision of the United States District Court

for the Southern District of New York, denying Appellant's petition for Writ of Habeas Corpus, be reversed, and that Appellant's release from confinement be ordered on the ground that his sentencing as a second felony offender unconstitutionally deprived him of his liberty without due process of law, denied him equal protection of the laws, and constitutes cruel and unusual punishment for the crimes of which he was convicted.

Dated: November 14, 1975

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

[U. S. ex rel.] MARK FRASIER, :

Petitioner, :

-against- :

J. L. CASSCLES, Superintendent of Great Meadow Correctional Facility, :

Respondent. :

- -X

75 Civ. 1556-CLB

MEMORANDUM AND ORDER

#43147

Brieant, J.

Petitioner, a state prisoner, was convicted after a jury trial in Supreme Court, New York County of the crimes of robbery in the first degree, assault in the first degree and possession of a loaded firearm. He was sentenced as a second felony offender, to concurrent terms of 15 to 16 years on the robbery count, 2 1/2 to 10 years on the assault count, and 3 1/2 to 10 years on the firearms count. Petitioner, by his petition pursuant to 28 U.S.C. §2254, seeks to challenge the felony conviction which served as the predicate felony offense for the sentence which he is currently serving.

Petitioner has previously sought a writ of habeas corpus fro this Court, which was denied by Memorandum and Order dated December 14

1971. On appeal, the Second Circuit affirmed in part and remanded the petition to the District Court to determine if petitioner had exhausted his state remedies in challenging the conviction upon which his sentence is predicated. United States ex rel. Frasier v. Henderson, 464 F.2d 260 (2d Cir. 1972). On remand, by Memorandum Decision and Order dated November 6, 1972 in Docket 71 Civ. 4071, this Court dismissed Frasier's petition without prejudice to his seeking the relief available to him in the state courts, it being clear that he had not exhausted his state remedies.

Thereafter, on February 6, 1973, petitioner moved in Supreme Court, Bronx County to be resentenced nunc pro tunc, pursuant to People v. Montgomery, 24 N.Y.2d 130, 299 N.Y.S.2d 156 (1969), on his original felony conviction, thereby reinstating his time for appeal. On April 25, 1973, Frasier's 1961 sentence was vacated and he was resentenced nunc pro tunc to the same term, as a procedural technic to grant him access to the state appellate process. On January 31, 1974, the Appellate Division, First Department affirmed the 1961 conviction without opinion, as did the New York Court of Appeals on February 12, 1975.

Petitioner then commenced this new action which was assigned to me pursuant to IAC Rule 9(B).

Counsel for petitioner and the State have waived an evidentiary hearing, asserting that only questions of law are raised by this petition.

On August 19, 1961, petitioner and Sherman Cobb were arrested for robbery. On September 5, 1961, they were indicted in Bronx County and charged with robbery-first degree, grand larceny-second degree, and receiving and concealing stolen property. By motion made returnable in Bronx County Court on October 5, 1961, defendant's counsel applied for an order adjudging Frasier to be a "Youthful Offender" within §913-g of the New York Code of Criminal Procedure, as then in effect.[1/]

In support of his motion, defense counsel informed that Court that Frasier was then eighteen years old, that he had no prior criminal convictions, and that this was "the first time that [the defendant had] ever been in any trouble whatsoever." Counsel also recounted how Frasier had been raised by his grandmother in South Carolina from age 3 until age 13 when he moved to New York and lived with his mother; that he had completed the eleventh grade before leaving high school to find full-time employment; and that the defendant was laid off at the time of his arrest and continued to be unemployed. (Exhibit D to Petition for Writ of Habeas

Corpus, filed March 28, 1975).

The District Attorney, by affidavit sworn to on October 4, 1961, opposed this application. His affidavit described the charges in the indictment. The District Attorney informed the Court that in the early morning hours of August 19, 1961, Frasier and Cobb stopped their victim on the street, and that Frasier held his hand in his jacket pocket simulating possession of a gun and demanded that his victim surrender his possessions. The District Attorney contended that youthful offender treatment should be denied "[i]n view of the nature of these charges, and the circumstances surrounding them." (Exhibit E to Petition). On October 5, 1961, the date for which the motion had been noticed, Judge Hyman Korn denied the defendant's application forthwith and from the bench, without making any formal findings.

On October 26, 1961, Frasier appeared again before Judge Korn, offered to withdraw his plea of not guilty and enter a plea of guilty to grand larceny in the second degree, a lesser included offense, in satisfaction of all potential criminal liability under the indictment. Judge Korn stated that he had been informed that Frasier had no prior convictions, and warned him that he was pleading guilty to a felony. The Court, after

inquiring into the voluntariness of the plea, accepted Frasier's guilty plea to a charge of grand larceny-second degree.[2/]

On November 29, 1961, Frasier appeared before Judge Korn for sentencing. The Court, after studying the probation report and hearing defense counsel's usual plea for leniency, imposed a period of indeterminate confinement at the Elmira Reception Center, a youth reformatory facility.

Petitioner contends that his present confinement as a second felony offender is in violation of his constitutional rights because the Court in 1961, when denying his application for youthful offender treatment on his predicate felony offense, denied him due process of law. Such denial is said to consist of failing to conduct a hearing or investigation of his application, and in failing to state the findings and reasons upon which the Court based its denial of youthful offender treatment. Petitioner further alleges that, although he was not charged with a crime which by statute would have rendered him ineligible for youthful offender treatment, he was nevertheless summarily denied this treatment because of the nature of the offense with which he was charged.

A sentencing judge is vested with broad discretion in determining what sentence is to be imposed. See Smith v. Follette,

445 F.2d 955 (2d Cir. 1971). Ordinarily, a lawful sentence imposed in the exercise of this discretion does not raise constitutional issues.[3/] United States v. Rosenberg, 195 F.2d 583, 604 (2d Cir.), cert. denied 344 U.S. 838 (1952).

Petitioner contends that the sentencing judge failed or refused to exercise his discretion, and in so doing violated petitioner's rights to due process of law, and therefore constitutional issues are raised which are appropriate for review on this petition for a writ of habeas corpus. See Dorszynski v. United States, 418 U.S. 424, 443 (1974); Yates v. United States, 356 U.S. 363 (1958).

The youthful offender statutes then in effect in New York served, as does the Federal Youth Corrections Act, 18 U.S.C. §§5005, et seq. to increase rather than to limit the options for the sentencing judge. Dorszynski v. United States, supra, analyzed the Federal Youth Corrections Act. The Court there determined that, properly construed, that statute required a district judge imposing sentence on a defendant eligible for treatment under the Act to consider the alternatives provided for in the Act, and, before imposing an "adult" sentence, to make an explicit finding that the youth offender would not derive benefit from them. Justice

Marshall, in a concurring opinion joined by three other Justices, would have held that the statute also required the sentencing judge to state the reasons upon which he based his finding that the defendant would not benefit from youth offender treatment. In Dorszynski, the Court was not required to rule whether, apart from the statutory requirements, the Due Process clause similarly required that the sentencing judge state that the defendant would not benefit from youth offender treatment. Courts confronted, after Dorszynski, with the issue of whether a sentencing judge must make a similar finding that young adult offender treatment would not be appropriate have held that such a finding was not required. See United States v. Gamboa-Cano, 510 F.2d 598 (5th Cir. 1975); United States v. Bailey, 509 F.2d 881 (4th Cir. 1975).

In denying petitioner's motion for youthful offender treatment, Judge Korn had before him the affidavits of the prosecutor and defense counsel. At the time of sentence, Judge Korn considered a probation report and defense counsel's plea for leniency. In imposing a reformatory sentence as to Frasier and a prison sentence for his co-defendant Cobb, Judge Korn clearly considered Frasier's age and individual life circumstances.

A sentencing judge need not conduct a hearing and make specific explicit findings in denying youthful offender treatment. People v. Fenner, 36 App. Div. 2d 825, 321 N.Y.S.2d 457 (2d Dept. 1971), aff'd 30 N.Y.2d 509, 329 N.Y.S.2d 823 (1972); People v. Rogers, 63 Misc.2d 312, 308 N.Y.S.2d 568 (Sup.Ct. N.Y. County 1970). Although it might be commendable in some cases for a sentencing judge to articulate his reasons for the sentence imposed, the Due Process clause does not require this procedure. United States v. Velazquez, 482 F.2d 139 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170 (2d Cir. 1973). Nor does the fact that the sentencing statute permits the exercise of judicial discretion without legislative guidelines offend the Due Process clause. Smith v. Follette, supra; Sero v. Oswald, 351 F.Supp. 522 (S.D.N.Y. 1972).

There was nothing improper in the Court's consideration of the underlying charge in its determination of a defendant's application for youthful offender treatment. While the statute then in effect categorically excluded only those youthful defendants accused of capital offenses or crimes which carried the punishment of life imprisonment, a judge could properly consider the offense charged and the alleged circumstances of its commission in exercising

his discretion. People v. Fenner, supra. This may have been the sole argument raised by the District Attorney in opposing petitioner's application, nevertheless, the Court had additional materials before it for consideration. The Court's reference to the seriousness of the offense at the time of sentencing does not indicate a fixed sentencing policy for robbers, or a predisposition against all youthful offender applications by defendants initially indicted for robbery-first degree. Cf. United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974); United States v. Baker, 487 F.2d 360 (2d Cir. 1973); United States v. Foss, 501 F.2d 522 (1st Cir. 1974).

In sum, the claims made here do not arise to the level of deprivation of a constitutional right. The failure to make a more formal record of consideration and denial of youthful offender treatment did not violate petitioner's constitutional rights. United States ex rel. Toland v. Phimister, 296 F.Supp. 1027, 1029 (S.D.N.Y. 1969).

The issue of whether in this instance there had been adequate compliance with the state statutory procedure for "investigation and questioning" is a question of state law. It is not the role of a federal district court to review claimed

errors of state law upon a petition for a writ of habeas corpus unless such errors result in an abridgment of a federal constitutional right. Schaefer v. Leone, 443 F.2d 182 (2d Cir), cert. denied 404 U.S. 939 (1971); Lee v. Henderson, 342 F.Supp. 561 (W.D.N.Y. 1972); United States ex rel. Birch v. Fay, 190 F.Supp. 105 (S.D.N.Y. 1961). As previously noted, this is not such a case.

The Court wishes to express its appreciation to Richard G. Ashworth, Esq., a member of the bar of this Court, for his tireless and loyal representation of Petitioner. Mr. Ashworth was appointed on appeal from the denial of this prisoner's petition in 1972, and has represented him thereafter through the process of exhausting his state remedies, in accordance with the highest ideals of representation of the indigent.

For the reasons stated herein, the petition for a writ of habeas corpus is denied.

So Ordered.

Dated: New York, New York
September 29, 1975

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
U. S. D. J.

FOOTNOTES

1. The Code of Criminal Procedure provided:

> "§ 913-e Definitions
>
> For the purpose of this title, the term 'youth' shall mean a minor who has reached the age of sixteen years or over but has not reached the age of nineteen years; and the term 'youghful offender' shall mean a youth who has committed a crime not punishable by death or life imprisonment, who has not previously been convicted of a felony, and who is adjudged a youthful offender pursuant to the provisions of the following sections. The interstate compact on juveniles, [footnote omitted] except the provisions of article four thereof, shall apply to youthful offenders to the same extent as to minors below sixteen years of age."
>
> § 913-g Determination of eligibility
>
> 1. In any case where a grand jury has found an indictment and it shall appear that the defendant is a youth, the grand jury or the district attorney may recommend to the court to which the indictment was returned, or to which the indictment was transferred for disposition, or, the court on its own motion may determine, that the defendant be investigated for the purpose of determining whether he is eligible to be adjudged a youthful offender.
>
> * * *
>
> 4. Upon the termination of such examinations, investigation and questioning, the court shall determine whether such defendant is eligible to be adjudged a youthful offender. Should the court determine that the defendant is eligible to be so adjudged, no further action shall be

taken on the indictment or information and the defendant shall be required to enter a plea of 'guilty' or 'not guilty' to the charge of being a youthful offender. Should the court determine the defendant ineligible to be so adjudged, it shall order the indictment or information to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had."

Under this provision, it had been held that a defendant might apply to the Court for determination of his eligibility prior to pleading, even if neither the grand jury nor the district attorney has recommended youthful offender treatment and the court has not acted upon its own motion. See People v. Judd, 61 Misc.2d 180, 305 N.Y.S.2d 316 (Franklin County Ct. 1969).

2. In accepting Frasier's offer to plead guilty to the lesser included offense, Judge Korn engaged the defendant in the following colloquy: (Tr. Bronx County Court, Oct. 26, 1961, p.6)

"THE COURT: And you wish to plead guilty of your own free will?

DEFENDANT FRASIER: I wish to plead guilty.

THE COURT: Has anybody told you as to what sentence the Court will impose, anyone, your lawyer, anyone, the District Attorney, or the Judge?

DEFENDANT FRASIER: No."

3. Courts have denied petitions in numerous instances where as grounds for habeas corpus relief the determinations of trial judges have been attacked as abuses of discretion: withdrawal of guilty plea, United States ex rel. Brown v. LaVallee, 424 F.2d 457, 458 n.2 (2d Cir), cert. denied 401 U.S. 942 (1970); United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508 (E.D.N.Y. 1967); United States ex rel. Best v. Fay, 239 F.Supp. 632 (S.D.N.Y. 1965), aff'd on opinion below, 365 F.2d 832 (2d Cir. 1966), cert. denied, 386 U.S. 998 (1967); denial of severance, United States ex rel. Billups v. Montanye, 367 F.Supp. 543 (S.D.N.Y. 1973); denial of motion for a new trial, United States ex rel. Conomos v. LaVallee, 363 F.Supp. 994 (S.D.N.Y. 1973); granting motion to consolidate indictments for trial, United States ex rel. Evans v. Follette, 364 F.2d 305 (2d Cir. 1966), cert. denied 385 U.S. 1016 (1967).

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